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No. 04-1510

In the Supreme Court of the United States

BENJAMIN FRANK RAMSEY; WILLIAM BOYD; GERALD ECKEL; ELZIE HALSEY; LUCIAN JOHNSON; BRUCE MAYBRIAR, on behalf of themselves and all members of the putative class,
Petitioners,

v.

FORMICA CORPORATION; FORMICA CORPORATION BENEFIT PLAN COMMITTEE; SCOTT A. SMITH; EDWARD R. CASE; EARL M. BENNETT; FRANK A. RIDDICK, III,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29(6), Respondent Formica Corporation discloses that it is not a subsidiary of a publicly owned corporation, nor does any publicly held company own 10% or more of the corporation's stock.

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STATEMENT OF THE CASE

I. Formica's Reductions in Force

Formica Corporation was spun off from American Cyanamid Company in 1985. Since 1985, Formica Corporation has gone through several reorganizations and changes of ownership; Formica Corporation filed a bankruptcy petition on March 5, 2002 and emerged on June 10, 2004 from reorganization under Chapter 11 of the Bankruptcy Code.

In the early 1970's, Formica Corporation employed over 1,400 union personnel in Cincinnati, Ohio. Since then, the number of Formica Corporation's represented workers has declined to less than half that size, partially through voluntary retirement programs and partially through involuntary reductions in force.

Apart from the voluntary retirement programs and the involuntary reductions in force, many Formica Corporation employees retired in the ordinary course; for example, Petitioner Boyd retired in January 1995 voluntarily and without the receipt of any incentives.

II. Formica's 1986 and 1996 Early Retirement Programs

In 1986, Formica offered to 52 employees, including Petitioner Ramsey, an early retirement program that allowed the employees to retire with a 10% increase in service for pension calculation purposes, the provision of an early retirement subsidy so that the 3% per year reduction in benefits for retirements prior to age 65 did not occur, the provision of a Social Security bridge payment whereby retirees under 62 would receive an amount equal to the Social

Security payment that they would have received if they had been 62, and a lump sum distribution of $400 per year of service. All of the persons eligible for the program took early retirement. Ramsey received each of these benefits.

In 1996, Formica Corporation offered a different early retirement program that provided for a bridge payment of $1,000 per month until the employee reached age 62 to employees whose age and service equaled or exceeded 90. Indeed, Formica's letter offering the program expressly identified this bridge payment as the only incentive for early retirement: "The incentive is $1,000 per month to be paid to you until your 62nd birthday." (Opposition Appendix A at 1b). The amounts of this incentive varied; for Petitioner Maybriar, the bridge payments totaled $67,000.

III. Petitioners Base Their Claims on "Estimates" That Are "Subject to Changes" and "Are Approximate Based on the Current Data Available"

As part of Formica's voluntary retirement programs in 1986 and 1996, some Formica retirees received documents that expressly identified future Plan pension benefits as "estimates." (Opposition Appendix C at 6b). These documents did not guarantee any pension benefit amount. As an example, the Maybriar "Total Estimate" states in bold: **"All estimates are subject to changes in Plan provisions and Social Security law."** (*Id.*). Indeed, Maybriar acknowledges that he understood he was not receiving a guaranteed benefit when he read the "Total Estimate" document, which expressly states that "[t]he calculations for this estimate are **approximate** based on the current data available." (*Id.*). Petitioner Ramsey's statement of benefits expressly undermines any claim that he relied on a specific calculation of benefits in electing to take early retirement:

"The benefits provided on this statement are estimates only. Your actual pension benefit will be calculated following your election to retire." (Opposition Appendix B at 4b).

IV. The Plan's 2002 Discovery of Erroneous Pension Payments

In 2002, Towers Perrin, then Formica's actuary, undertook an audit of the payments to 37 Formica retirees and determined that most retirees had been receiving inaccurate pension benefits from the Plan. When the issue was brought to the Formica Corporation Benefit Plan Committee ("Committee"), the decision was made that no benefits payments would be changed until the Committee was completely confident what the issues were and that they were taking the correct action.

Formica engaged Mercer Human Resource Consulting ("Mercer") in August 2002 to sample the Plan's pension payments to determine if there were larger issues with the Plan's calculation of pension benefits for the 37 retirees initially sampled. Mercer determined that there were a significant number of errors in the Plan's pension calculations.

V. The Plan's 2002 Use of the IRS's Voluntary Correction Program

As a result of Mercer's initial sample that identified significant problems, the Committee, in fulfillment of its fiduciary duties, took two actions. First, the Committee engaged Mercer to undertake a detailed examination of each retiree's pension benefit calculations to determine the correct Plan pension amount. Second, to protect the tax-qualified status of the Plan, the Committee determined to seek approval

from the IRS for a correction plan. Following the IRS guidelines in Rev. Proc. 2002-47 for the voluntary correction of the operational failures of the Plan, the Plan submitted to the IRS a Compliance Statement for the Plan on November 6, 2002. (Petition Appendix D at 49a-73a).

In the Compliance Statement, Formica identified its intention to correct all erroneous payments, reducing future payments to the amounts determined to be proper for retirees who had been overpaid, while making lump sum payments and increasing future payments to retirees who had been underpaid. In submitting the Compliance Statement, the Plan sought to implement Rev. Proc. 2002-47, which mandates (at a minimum) the reduction to the correct amount of any Plan pension payments in excess of the amount established by the Plan. Rev. Proc. 2002-47. Although the Committee knew by the time that the Compliance Statement was submitted to the IRS that there were erroneous calculations, the Committee determined not to alter benefits until Mercer completed its review and confirmed all retiree pension calculations.

VI. Mercer's November 18, 2003 Report to the Committee

Beginning in late 2002 and continuing through 2003, Mercer undertook to review all Plan pension calculations. Based on its review of the best available documents, Mercer submitted to the Committee a report, dated November 18, 2003, that summarized the results of Mercer's examination.

In its report, Mercer detailed that of 624 retirees participating in the Plan, miscalculations had resulted in 173 retirees being underpaid and 295 retirees being overpaid. The Mercer report identified the nature of the miscalculations and the financial impact on the Plan and the Plan participants.

VII. The Committee's Action

Acting on the Mercer report, the Committee determined that the Employee Retirement Income Security Act of 1974, as amended ("ERISA") and federal common law, as well as IRS and Department of Labor regulations and pronouncements, required the adjustment of future payments to the correct amounts. Acting as quickly as possible, Formica implemented the corrections for both overpaid and underpaid retirees in January 2004 by providing a lump sum equal to past underpayments plus interest and increasing the amounts due those historically underpaid to the correct amount, while decreasing to the correct amount those historically overpaid. To date, the Plan has not sought to recoup past overpayments.

VIII. The Petitioners' Claims

In the Amended Complaint, Petitioners advance breach of fiduciary duty claims under ERISA and state-law negligent misrepresentation and promissory estoppel claims against Formica based on alleged misrepresentations involving pension benefits. Petitioners seek monetary damages and purport to seek unspecified equitable relief.

In seeking interlocutory relief, Petitioners ask the District Court to award money damages, *viz.*, an increase in "monthly pension benefit payments to Plaintiffs and each member of the putative class." Petitioners' Motion for Temporary Restraining Order and Preliminary Injunction at 1. Petitioners repeatedly reaffirmed their claim for benefits in statements before the District Court on February 20, 2004. In effect, Petitioners seek money damages equal to the amount of pension benefits to which they claim they are entitled.

SUMMARY OF THE ARGUMENT

This case does not present any of the traditional reasons for granting a Petition for a Writ of Certiorari. *See generally* Supreme Court Rule 10(a)-(c) (setting forth the reasons that typically present a sufficiently compelling justification for this Court to issue a writ of certiorari). This case does not present conflicting judicial decisions on an important matter; there has not been any departure from settled Supreme Court decisions by the lower courts warranting the exercise of this Court's supervisory power; and this case does not present an important question of federal law that has not yet been settled by this Court.

As part of the regular administration of its Pension Plan, Petitioner Formica was informed by its actuaries that the initial calculations of some retirees' pension payments were mistaken. Formica commissioned a review of the payments to all plan participants and discovered numerous under - and overpayments. Formica corrected the errors, making up underpayments, and providing each retiree with the properly calculated benefits under the Plan going forward. Internal Revenue and Department of Labor regulations permit no alternative action. Petitioners seek to compel Formica to pay them more than Petitioners are entitled to under the terms of the Plan. To do so would violate federal pension and tax law, while endangering the rights of all current and future retirees of the Plan, which is currently underfunded.

Section 502 of ERISA, *codified at* 29 U.S.C. § 1132, provides a "comprehensive and reticulated" scheme for statutory enforcement. *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985). Section 502(a)(3) of ERISA, under which Petitioners seek to enforce their breach of fiduciary duty claim, permits "other appropriate equitable

relief." 29 U.S.C. § 1132(a)(3). In its previous decisions, the Court has conclusively delineated the meaning of the phrase "other appropriate equitable relief" to exclude the payment of monetary damages, even when the requested relief is couched in terms of injunctive relief. *See Mertens v. Hewitt Assoc.*, 508 U.S. 248, 255 (1993); *Great-West Life & Annuity Co. v. Knudson*, 534 U.S. 204, 210 (2002). The District Court and the Court of Appeals, following this Court's precedent, correctly held that the payment of money, which Petitioners seek in this action, in excess of the amounts to which they are entitled under Formica's Plan, is not equitable relief available under ERISA.

Petitioners claim that this Court should ignore plain statutory language and abandon its well-developed analysis of ERISA § 502(3)(a) in order to create a "make-whole" remedy. Petitioners' arguments regarding "traditional trust law" and general statements of the purpose of Congress in enacting ERISA have been fully considered and rejected by this Court. *See Aetna Health, Inc. v. Davila*, 542 U.S. 200, 124 S. Ct. 2488 (2004). Furthermore, Petitioners fail to muster any evidence of "disarray" in the circuits in this regard.

Equally well established are ERISA's preemptive powers. Just last year, the Court revisited this issue in *Davila*, confirming "the clear congressional intent to make the ERISA remedy exclusive." *Davila*, 542 U.S. 200, 124 S. Ct. at 2495. ERISA preempts any state-law actions that "relate to an employee benefit plan." ERISA § 514(a), *codified at* 29 U.S.C. § 1144(a). Petitioners' state-law claims for negligent misrepresentation and promissory estoppel, which seek to alter the payments Petitioners are entitled to receive pursuant to Formica's Pension Plan, fall squarely within ERISA's preemptive powers.

Finally, the Court should deny certiorari because the record is not sufficiently developed for final review. The case presents itself as an interlocutory appeal of the District Court's denial of Petitioner's Motion for Temporary Restraining Order and Preliminary Injunction, finding that, as a matter of law, the relief Petitioners seek is not available under ERISA. In order to fully adjudicate this case, the District Court should have the opportunity to consider, among other issues: (1) the fact that Petitioners had not exhausted their administrative remedies; (2) that Petitioners' reliance claims are factually defective because Petitioners received only estimates, not promises on which they could justifiably rely; and, (3) that Formica breached no fiduciary duty in relying on an enrolled actuary's miscalculation of pension benefits.

REASONS FOR DENYING THE WRIT

I. The Issue of What Remedies Are Permitted Under ERISA § 502(a)(3) Has Been Conclusively Resolved by the Court's Prior Decisions.

The courts below held that Petitioners' breach of fiduciary duty claim under ERISA cannot succeed because, as relief, Petitioners seek compensatory damages that are not equitable in nature. (Sixth Circuit Opinion ("Opinion"), Petition Appendix A at 8a-9a; District Court Order ("Order"), Petition Appendix C at 19a). Since the Court's decisions in *Mertens* and *Knudson,* courts have unanimously held that ERISA § 502(a)(3), *codified at* 29 U.S.C. § 1132(a)(3), does not allow an award of monetary or compensatory damages as

"other appropriate equitable relief."[1] *See Mertens v. Hewitt Assoc.*, 508 U.S. 248, 255 (1993); *Great-West Life & Annuity Co. v. Knudson*, 534 U.S. 204, 210 (2002). Petitioners asked the District Court to order Formica to pay pension benefits not at the level authorized by the terms of the Plan, but rather at the higher level that they had been historically overpaid. In declining to grant the requested relief, the courts below recognized the Court's holding in *Knudson* that "an injunction to compel the payment of money past due under a contract, or specific performance of a past due monetary obligation, was not typically available in equity." *Knudson*, 534 U.S. at 210. In reaching this conclusion, the courts adhered to this Court's analysis that Petitioners, like Great-West in *Knudson*, do not seek equitable relief, but rather "seek[] legal relief - the imposition of . . . liability on respondents for a contractual obligation to pay money." *Id.* at 221.

Petitioners repeatedly have stated that they seek an award of the type of damages forbidden by *Knudson*. Petitioners'

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[1] *See, e.g., Michaels v. Breedlove, 2004* U.S. App. LEXIS 25165, at [*5-8] (3d Cir. 2005); *Bauhaus USA, Inc. v. Copeland*, 292 F.3d 439, 445 (5th Cir. 2002); *Crosby v. Bowater Inc.*, 382 F.3d 587 (6th Cir. 2004), *cert. denied*, 2005 U.S. LEXIS 3357 (U.S., Apr. 18, 2005); *Local 6-0682 Int'l Union of Paper, Allied-Industrial, Chem. & Energy Workers v. Nat'l Indus. Group Pension Plan*, 342 F.3d 606, 609 n.2 (6th Cir. 2003); *Primax Recoveries, Inc. v. Sevilla*, 324 F.3d 544, 547-48 (7th Cir. 2003); *Calhoon v. TWA*, 400 F.3d 593, 597-98 (8th Cir. 2005); *Honolulu Joint Apprenticeship & Training Comm. of United Ass'n Local Union No. 675 v. Foster*, 332 F.3d 1234, 1237-38 (9th Cir. 2003); *Callery v. United States Life Ins. Co.*, 392 F.3d 401, 404-07, 409 (10th Cir. 2004); *Millsap v. McDonnell Douglas Corp.*, 368 F.3d 1246, 1248, 1252-54 (10th Cir. 2004); *Flint v. ABB, Inc.*, 337 F.3d 1326, 1330-31 (11th Cir. 2003).

Motion for Temporary Restraining Order and Preliminary Injunction sought compensatory damages in the form of an order prohibiting Formica from paying the pension benefits due under the terms of the Plan, but instead requiring Formica to pay "the monthly pension benefit payments to Plaintiffs and each member of the putative class" that they had historically been overpaid. At the hearing on their Motion for Temporary Restraining Order and Preliminary Injunction, Petitioners' counsel stated "We're asking them to rip up the [pension] checks and just issue the checks in the amount they're supposed to be receiving." In summarizing their claim at the Preliminary Injunction Hearing, counsel for Petitioners stated:

> We believe the Court could fashion a remedy which would require the Plan Administrator . . . to resume the checks back to the original amounts that all the Plaintiffs were promised. That would mean making up two months of pay.

This relief is not available under ERISA. *See Knudson*, 534 U.S. at 210.

The District Court reached its legal conclusion wholly in line with *Knudson* and its progeny, even assuming the truth of Plaintiffs' factual assertions:

> Under § 1132(a)(3), only "appropriate equitable relief" is available, which means only those categories of relief traditionally available in equity. *Great-West Life & Annuity Co. v. Knudson*, 534 U.S. 204 (2002). Money damages or compensatory damages, and punitive damages are not available under § 1132(a)(3). *Id. Community Ins. Co. v. Morgan*, 54 Fed. Appx. 828, 832 (6th Cir. 2002); *Allinder,* 152 F.3d at 552;

> *Local 6-0682*, 342 F.3d at 609 n. 2. Injunctive relief is equitable in nature, *Mertens v. Hewitt Assoc.*, 508 U.S. 248, 255 (1993), and, although Plaintiffs do seek an injunction, what they really want is to continue to be paid the monthly amount they were promised. In other words, Plaintiffs seek to recover their reliance interest in Formica's representations about their monthly benefits. Therefore, although at this point the claim for relief is couched in terms of injunctive relief, the ultimate relief sought by Plaintiffs is really money damages. Thus, Plaintiffs' claim for injunctive relief, as it now stands, is barred pursuant to the authorities just cited.

(Order at 19a). The District Court, giving Petitioners every benefit in broadly analyzing the First Amended Complaint, properly concluded that Petitioners' ERISA breach of fiduciary duty claim could not succeed because the only relief that Petitioners seek is monetary damages not authorized under ERISA § 502(a)(3).

Likewise, the Court of Appeals held that the "Act does not provide a cause of action for legal actions for monetary damages disguised as suits in equity." (Opinion at 9a (citing *Knudson*, 534 U.S. at 215-16)). Applying *Knudson*, the Court of Appeals stated:

> Here, plaintiffs request a restraining order; ordinarily, this is a form of equitable relief. However, plaintiffs ask the Court to direct Formica, or its pension plan, to pay monies, which are not owed, for an uncertain duration. . . . This form of relief is not authorized

> under the Act. Therefore, the district court correctly denied plaintiffs' motion.

(*Id.*)

Petitioners challenge this Court's unmistakable prior holdings by quoting at length from an *amicus* brief of the United States, which the Court has previously considered and rejected. Petitioners contend that the Court should abandon its rigorous fidelity to the text of § 502(a)(3), substituting a more generous interpretation based on Petitioners' vision of "settled trust-law understanding dating from the days of the divided bench." Petition at 9-11. These amorphous contentions ignore the plain meaning of the statute and the Court's fully developed analysis, beginning with *Russell's* recognition of "ERISA's interlocking, interrelated and interdependent scheme, which is in turn part of a 'comprehensive and reticulated statute.'" *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985). Petitioners further complain that the Court, in its previous decisions, should have ignored ERISA's "comprehensive and reticulated" enforcement scheme in light of Congress's generalized statements that ERISA was intended to protect the interest of plan participants. Petitioners forget that ERISA's complex and detailed statutory scheme "resolved innumerable disputes between powerful competing interests – not all in favor of potential plaintiffs." *Mertens v. Hewitt Assoc.*, 508 U.S. 248, 262 (1993). The Court stated in *Knudson*:

> [A]s we explained in *Mertens*, "even assuming" . . . the lack of other means of obtaining relief, "vague

> notions of a statute's 'basic purpose' are nonetheless inadequate to overcome the words of its text regarding the *specific* issue under consideration." 508 U.S. at 261.

Knudson, 534 U.S. at 220 (italics in original). Because the courts below correctly analyzed Petitioners' claims in light of ERISA's statutory enforcement scheme, their decisions denying Petitioners' request for injunctive relief should not be disturbed. Petitioners' reliance on Justice Ginsburg's dissent in *Knudson* is emblematic of Petitioners' refusal to acknowledge the governing law with respect to their claims.

Petitioners offer nothing to support their contention that the courts of appeals are "in disarray" with respect to the scope of relief available under ERISA § 502(a)(3). On examination, their citation to two unreported cases is ineffective. In *Rubin-Schneiderman*, the Second Circuit reviewed the District Court's denial of plaintiff's request to amend his complaint to assert a fiduciary duty claim under ERISA § 503(a)(3). *Rubin-Schneiderman v. Merit Behavioral Care Corp.*, 121 Fed. Appx. 414, 416, 2005 WL 229862 at [*1] (2d Cir. 2005). Apparently the plaintiff had referred to § 502(a)(3) in his "wherefore" clause only. The District Court denied plaintiff's subsequent attempt to amend to formally assert a claim under that section of the Act. *Id.* After holding that plaintiff's common-law negligence claims were preempted by ERISA, the court remanded "for further consideration of Plaintiff's attempt at amendment of his complaint to assert a claim under ERISA § 502(a)(3)." *Id.* This holding does nothing to establish Petitioners' contention that the courts of appeals are in disarray on the issue of the relief allowable under ERISA § 502(a)(3).

In *Schaffer*, the other unpublished decision cited by Petitioners, the defendant conceded that it had breached its fiduciary duty under § 502(a)(3). *Schaffer v. Westinghouse Savanna River Co.*, 2005 WL 567812 at [*4] (4th Cir. 2005). Further, "at oral argument, [the defendant] expressly conceded that it was within a court's equitable powers" to require it to provide the plaintiff some relief. *Id.* at [*5]. The Fourth Circuit concluded that "[b]ecause the record lacks any basis for determining whether this equitable remedy is an 'appropriate' one, we must remand that question to the district court." *Id.*

The two other post-*Knudson* cases cited by Petitioners are simply irrelevant. *See Grigg v. DuPont De Nemours & Co.*, 385 F.3d 440, 449-52 (4th Cir. 2005) (holding that in certain circumstances, "rescission" can be an equitable remedy available under ERISA § 502(a)(3)); *Mathews v. Chevron Corp.*, 362 F.3d 1172, 1185-87 (9th Cir. 2005) (upholding *Knudson*'s prohibition of money damages in awarding equitable relief).

Finally, as Petitioners admit, pre-*Knudson* decisions, such as *Strom v. Goldman, Sachs & Co.*, 202 F.3d 138 (2d Cir. 1999), which granted monetary relief, are inapposite in light of *Knudson*. Petition at 14-15 (citing *Calhoon v. Trans World Airlines, Inc.*, 400 F.3d 593, 597-98 (8th Cir. 2005), for the proposition that *Knudson* forecloses the remedy in *Strom*). In short, none of the cases cited by Petitioners substantiates Petitioners' contention that the circuits are in disarray so as to require the attention of this Court. Accordingly, the Petition should be denied.

II. The Courts of Appeals Have Not "Overstated" the Breadth of ERISA Preemption, But Rather Are Unanimous in Their Application of ERISA's "Expansive Preemption Provisions," in Deference to the Plain Meaning of the Act as Conclusively Confirmed by the Court.

Petitioners acknowledge that the courts of appeals are now unanimous in their holdings that state-law tort claims for negligent misrepresentation and promissory estoppel, such as those alleged by Petitioners, are preempted by ERISA.[2] Petition at 16, 18. Nonetheless, Petitioners contend that the lower courts have "overstated" the breadth of the ERISA preemption. *Id.* Petitioners ignore that the courts of appeals have adopted their interpretation of the broad preemptive power of ERISA in compliance with the plain language of the statute, as repeatedly clarified by this Court. In the end, Petitioners urge the Court to ignore ERISA and adopt a restrictive reading of the Act on grounds previously considered and conclusively rejected by the Court.

Petitioners admit that "the authorities from the Sixth Circuit and numerous other courts, which have in the past allowed limited state-law claims such as those advanced by Petitioners to proceed, are evidently no longer good law." *Id.* at 18. Though Respondents submit that state-law claims such as those advanced by Petitioners have never properly escaped the preemptive power of ERISA, the Court's

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[2] *See, e.g., Haynes v. Prudential Health Care*, 313 F.3d 330, (5th Cir. 2002); *Penny/Ohlmann/Nieman, Inc. v. Miami Valley Pension Corp.*, 399 F.3d 692, 702 (6th Cir. 2005); *Anderson v. UNUM Provident Corp.*, 369 F.3d 1257, 1259 (11th Cir. 2004) (fraud); *Gilbert v. Alta Health & Life Ins. Co.*, 276 F.3d 1292, 1294-95, 1301 (11th Cir. 2001) (same).

unanimous holding in *Davila* last term definitively resolved any lingering confusion regarding ERISA's preemptive scope with respect to state tort claims. *See Davila*, 542 U.S. 200, 124 S. Ct. at 2495, 159 L. Ed at 327.

ERISA § 514, *codified at* 29 U.S.C. § 1144, preempts state-law causes of action that, like Petitioners' claims, are directed against ERISA plans:

> [a]ny state-law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy conflicts with the clear congressional intent to make the ERISA remedy exclusive and is therefore pre-empted. *See* [*Pilot Life*,] 481 U.S., at 54-56, 95 L. Ed. 2d 39, 107 S. Ct. 1549; *see also Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 143-145, 112 L. Ed. 2d 474, 111 S. Ct. 478 (1990).

Davila, 542 U.S. 200, 124 S. Ct. at 2495, 159 L. Ed at 327. ERISA's preemption provision, ERISA § 514(a), *codified at* 29 U.S.C. § 1144(a), provides in relevant part: "the provisions of this subchapter . . . shall supersede any and all State-laws insofar as they may now or hereafter relate to any employee benefit plan. . . ." 29 U.S.C. § 1144(a). The purpose of ERISA is to provide a uniform regulatory regime over employee benefit plans. *Davila*, 542 U.S. 200, 124 S. Ct. at 2495, 159 L. Ed at 327. ERISA includes expansive preemption provisions which are intended to ensure that employee benefit plan regulation would be exclusively a federal concern. *Id. Accord Egelhoff v. Egelhoff*, 532 U.S. 141, 146-149 (2001); *Pilot Life Ins. Co. v. Dedeaux*, 41 U.S. 41, 45-46 (1987). The "integrated enforcement mechanism . . . is a distinctive feature of ERISA, and essential to accomplish Congress's purpose of creating a comprehensive

statute for the regulation of employee benefits plans." *Davila*, 542 U.S. 200, 124 S. Ct. at 2495, 159 L. Ed at 327. The courts below correctly held that no likelihood of success existed as to Petitioners' state-law claims on the ground that they are preempted by ERISA.

A law "relates to" an employee benefit plan, in the normal sense of the phrase, if it has a connection with or references such a plan. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983). Under this "broad common-sense meaning," a state-law may "relate to" a benefit plan, and thereby be preempted, even if the law is not specifically designed to affect such plans, or the effect is only indirect. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 47 (1987). *Accord Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 139 (1990) (employee's wrongful termination claim preempted by ERISA). Petitioners admit that their claim relies upon "the fact that the . . . inaccurate information provided by Formica was the amount of Petitioners' monthly benefits under the plan." Petition at 16. This admission is sufficient to assure that their claims are preempted.

Petitioners attempt to escape preemption by arguing that their state-law claims seek "a remedy from their former employer, Formica Corporation, . . . when inducing them to accept early retirement . . ., not the retirement plan." Petition at 16. The Sixth Circuit correctly addressed this argument:

> [I]t is clear that all of plaintiffs' state-law claims stem from the actions of Formica in processing of their benefit payments. Furthermore, the amount that Formica would owe, assuming relief is granted, is a function of how much the pension plan pays to each plaintiff. It is well established that such state-law tort

> claims are preempted by the Act. *See Pilot Life Ins. Co.*, 481 U.S. at 57 (state-law bad-faith claim preempted); *Tolton v. Am. Biodyne, Inc.*, 48 F.3d 937, 942 (6th Cir. 1995) (finding state-law claims for wrongful death, improper denial of benefits, medical malpractice, and insurance bad faith preempted *because defendants "were determining what benefits were available to [plaintiff] under the plan")*; *Cromwell* [*v. Equicor-Equitable HCA Corp.*], 944 F.2d [1272], 1276 [6th Cir. 1991] (holding state-law claims of promissory estoppel, breach of contract, negligent misrepresentation, and breach of good faith based on denial of benefits "are at the very heart of issues within the scope of ERISA's exclusive regulation").

(Opinion, Petition Appendix A at 7a-8a) (emphasis added).

Based on the application of the Plan, Petitioners' state-law negligent misrepresentation and promissory estoppel claims "relate to" Formica's pension plan. Therefore, ERISA preempts these claims. This Court should reject Petitioners request for the Court to grant certiorari to ignore the plain meaning of the statute, to disturb the unanimity of the courts of appeals, and to undo this Court's unanimous and conclusive holding in *Davila*.

III. The Record Is Not Sufficiently Developed to Warrant Certiorari.

The Court has consistently refused to consider controversies when the record has not been sufficiently developed. *See, e.g., Rufo v. Inmates of Suffolk Cty. Jail,* 502 U.S. 367, 387 n.10 (1992) (refusing to reach issue because record not fully developed); *Keller v. State Bar of*

Cal., 496 U.S. 1, 17 (1990) (same); *Illinois v. Gates*, 462 U.S. 213, 252-53 (1983) (same); *Pennhurst State School & Hosp. v. Romeo*, 457 U.S. 307, 329 (1982) (Blackmun, J. concurring) (same). The record is not fully developed because this matter is before the Court on an interlocutory appeal of the denial of Petitioners' request for injunctive relief. On this ground alone, certiorari should be denied.

The courts below correctly held that Petitioners were not entitled to injunctive relief. Both the District Court and the Court of Appeals found that Petitioners were not likely to succeed on the merits on purely legal grounds, because the monetary relief which Petitioners seek is not available under ERISA. The District Court also found that the issuance of the requested injunction would place innocent plan participants, who were not members of the putative class, at risk. (Order, Petition Appendix B at 20a-21a). Finally, the District Court found that the public interest would "weigh in favor of adhering to ERISA's enforcement scheme and against granting the injunctive relief requested by Plaintiffs." (*Id.* at 21a). Although the record clearly establishes that the courts below properly denied Petitioners' injunctive relief, a fully developed record would establish numerous other procedural, factual, and legal problems with Petitioners' claims, making certiorari review premature.

A. Petitioners Had Not Exhausted Their Administrative Remedies.

The courts of appeals uniformly hold that "the administrative scheme of ERISA requires a participant to exhaust his or her administrative remedies prior to commencing suit in federal court." *Costantino v. TRW, Inc.*, 13 F.3d 969, 974 (6th Cir. 1994) (quoting *Miller v. Metropolitan Life Ins. Co.*, 925 F.2d 979, 986 (6th Cir.

1991)); *see also Springer v. Wal-Mart Assoc. Group Health Plan,* 908 F.2d 897, 899 (11th Cir. 1990); *Makar v. Health Care Corp. of Mid-Atlantic,* 872 F.2d 80, 82-83 (4th Cir. 1989). Not only does the legislative history of ERISA support this proposition, *see Amato v. Bernard,* 618 F.2d 559, 567 (9th Cir. 1980), but the relevant ERISA provision reads: "Every employee benefit plan shall . . . afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim." 29 U.S.C. § 1133(2). *See Mason v. Continental Group, Inc.,* 763 F.2d 1219, 1226-27 (11th Cir. 1985), *cert. denied,* 474 U.S. 1087 (1986).

At the time of the District Court's decision, no Petitioner had exhausted his administrative remedies under the Plan. At the February 20, 2004 hearing, Petitioners' counsel recognized Petitioners' duty to exhaust ERISA's administrative remedies in stating that "[w]e intend to pursue on behalf of each and every one of our clients the ERISA administrative process that is set out in the letters that all of them received. . . ." Because Petitioners had not exhausted their administrative remedies, this case is not appropriate for certiorari.

B. The Facts Do Not Support Petitioners' Misrepresentation and Estoppel Claims.

Petitioners' reliance claims fail for numerous reasons. One Petitioner retired in the ordinary course, without any early retirement incentive. Those who participated in incentive plans received the consideration they expected and were promised. Finally, the representations as to pension amounts were identified as estimates rather than as specific promises.

Petitioner Boyd did not participate in any early retirement incentive, therefore he cannot maintain a misrepresentation claim. Of the remaining Petitioners, all but Ramsey, participated in the 1996 early retirement program in which the sole incentive was a bridge payment of "$1,000 per month to be paid to you until your 62nd birthday." (Respondents' Brief in Opposition to Petition for Writ of Certiorari ("Opposition") Appendix A at 1b). No dispute exists that Formica made the bridge payments to the Petitioners.

Errors in pension benefits "estimates" are not misrepresentations that could support Petitioners' claim for breach of fiduciary duty under ERISA. *See, e.g., SmarTalk Teleservices, Inc. Sec. Litig.*, 124 F. Supp. 2d 487, 502 (S.D. Ohio 2000) ("A statement on which liability for misrepresentation may be based must be one of fact, not of expectation, estimate, opinion, or judgment."); *Miami Packaging, Inc. v. Processing Systems, Inc.*, 792 F. Supp. 560, 565-66 (S.D. Ohio 1991) (no justifiable reliance on estimates known to be subject to change).

The documents provided to Petitioner Ramsey not only made clear that they were "estimates only," but also that Ramsey's "actual pension benefit will be calculated following [his] election to retire." (Opposition Appendix B at 4b). Similarly, the 1996 early retirement forms received by other Petitioners not only were captioned "Total Estimate," but noted: "The calculations for this estimate are **approximate** based on the current data available. The monthly amounts shown represent an **estimate** of the total benefit. . . ." (Opposition Appendix C at 5b, 6b) (emphasis in original). Simply put, Petitioners' claims predicated on inaccuracies in estimates, rather than guarantees, of pension benefits will not support a claim for misrepresentation, estoppel or ERISA breach of fiduciary duty.

C. Formica Breached No Fiduciary Duty to Petitioners in Relying on an Enrolled Actuary's Calculation of Pension Benefits.

Petitioners cannot establish that Formica breached any ERISA fiduciary duty when Formica relied on its actuary's erroneous calculations in informing Petitioners of their estimated retirement benefits. *See, e.g., Hart v. Equitable Life Assur. Soc'y,* 2002 U.S. Dist. LEXIS 22928 (S.D.N.Y. 2002), *aff'd*, 2003 U.S. App. LEXIS 19397 (2d Cir. 2003); *Kuehl v. Chrysler Pension Plan,* 895 F. Supp. 1147, 1155 (E.D. Wis. 1995); *Easa v. Florists' Transworld Delivery Ass'n,* 5 F. Supp. 2d 522, 528 (E.D. Mich. 1998). *See also Muse v. Int'l Business Machines Corp.,* 103 F.3d 490 (6th Cir. 1996) (only intentional misrepresentations support claim for ERISA breach of fiduciary duty), *cert. denied*, 520 U.S. 1240 (1997). *See generally* 29 C.F.R. § 2509.75-8, FR-11.

In short, courts recognize that a plan's reliance on an ERISA enrolled actuary's calculation of benefits in providing benefit estimates alternately implicates no fiduciary duty or violates no fiduciary duty. *See, e.g., Fitch v. Chase Manhattan Bank, N.A.*, 64 F. Supp. 2d 212 (W.D.N.Y. 1999); *Easa v. Florists' Transworld Delivery Ass'n*, 5 F. Supp. 2d 522, 528 (E.D. Mich. 1998); *Gramm v. Bell Atlantic Mgt. Pension Plan*, 983 F. Supp. 585, 593 (D.N.J. 1997); *Kuehl v. Chrysler Pension Plan*, 895 F. Supp. 1147, 1155 (E.D. Wis. 1995).

Due to the undeveloped record with respect to these issues, this Court should decline to grant certiorari in this case.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully Submitted

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APPENDIX A

March 11, 1996

Bruce Maybriar
6762 Oakland Ave.
Loveland, OH 45140

Dear Bruce:

This letter is to highlight the terms of the retirement incentive being offered to you by Formica Corporation. This incentive is being offered to production employees who have age and service equal to or greater than 90 years. The incentive is $1,000 per month to be paid to you until your 62nd birthday. This payment will be made monthly through payroll with statutory deductions, through the month in which you turn 62.

Attached is a Notice of Retirement and Release Agreement which must be signed in order for you to receive this benefit. Also attached is a benefit question and answer sheet which will be reviewed with you by a company benefits representative.

Per the Notice of Retirement and Release Agreement, you will have 45 days to decide whether you want to accept this retirement incentive and 7 days to revoke after signing.

Sincerely,

Peter Olmsted
Director of Human Resources

APPENDIX B

11. YOUR PERSONALIZED STATEMENT OF BENEFITS

PREPARED FOR: (1) B.F. Ramsey
SOC. SEC. NO.: (2) ***-**-****

The following statement compares the estimated benefits that would be payable to you if you retire as of December 31, 1986 under both the Special Retirement Program and under regular Plan provisions. These benefits are shown on the basis of a Single Life Annuity, the automatic form of payment for unmarried employees, and on the basis of a Life Annuity with a 50% Surviving Spouse Benefit, the automatic form of payment for married employees. Other forms of payment are also available for those vested under the "Rule of 65" that, if elected, would change the amounts shown below.

SINGLE LIFE ANNUITY

	Special Benefits		Regular Benefits
(a) Annual income	(12)	10,683.07	(6) 8,863.16
(b) Social Security	(13)	0	(13) 0
(c) Social Security bridge	(14)	7,113.60	$0
(3) TOTAL BENEFIT (a)+(b)+(c)		17,796.67	8,863.16
Special Service Supplement	(15)	12,366.67	$N/A

LIFE ANNUITY WITH 50% SURVIVING SPOUSE BENEFIT

	Special Benefits		Regular Benefits	
(a) Annual income for you *	(17)	9,632.92	(16)	7,991.91
(b) Social Security	(13)	0	(13)	0
(c) Social Security bridge	(14)	7,113.60		$0
(3) TOTAL BENEFIT		16,746.52		7,991.91
Special Service Supplement	(15)	12,366.67		$N/A

*Under both the Special Retirement Program and regular Plan benefits, your surviving spouse would receive a continuation of your pension under this form of Plan payment after your death. This benefit would equal 50% of the benefit you were receiving from the Plan. If your spouse is age 62, he or she may be eligible to collect Social Security. The Social Security bridge provided by the Program stops at the earlier of your reaching age 62 or your death.

The benefits provided on this statement are estimates only. Your actual pension benefit will be calculated following your election to retire.

APPENDIX C

MARCH 11, 1996

TOTAL ESTIMATE
AMERICAN CYANAMID COMPANY
FORMICA CORPORATION
EMPLOYEE RETIREMENT PLANS

Pension ESTIMATE for: BRUCE MAYBRIAR

Termination Date: 11/10/2001

Benefit Commencement Date: 12/1/2001

PER MONTH

OPTION	TO YOU	TO BENEFICIARY AFTER YOUR DEATH
Single Life Annuity	$1056.56	$0
10 Year, Certain & Continuous Option	$996.34	$Any unpaid portion of 120 monthly payments
50% Contingent Annuitant Option	$932.94	$466.47

PER MONTH

OPTION	TO YOU	TO BENEFICIARY AFTER YOUR DEATH
100% Contingent Annuitant Option	$834.68	$834.68

PENSION BENEFITS AGE 62

NOTE: The calculations for this estimate are **approximate** based on the current data available. The monthly amounts shown represent an **estimate** of the total benefit from American Cyanamid Company's Plan and Formica Corporation's Plan. The benefits shown do not reflect any reductions for the election of any optional pre-retirement death benefits. **All estimates are subject to changes in Plan provisions and Social Security law.**

Prepared by: Hope Reilly
Manager, Corporate Benefits
315-786-3576

BTR = Formica/pension guarantee